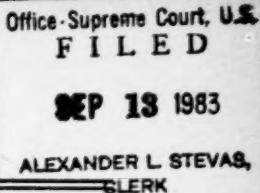


83 - 645

No.



In the Supreme Court of the United States

October Term, 1983

JEROME WAYNE PAUL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether Petitioner's rights under the due process clauses of the Constitution of the United States were denied when he was convicted of conspiring to do an impossible act?
2. Whether impossibility is a defense in some cases, but not in conspiracy cases?
3. Whether there is a difference in a conspiracy to sell an uncontrolled substance (albeit unknown to the seller/defendant - See *United States v. Binetti*, 552 F.2d 1141, 1142 [Fifth Circuit 1977]), and a conspiracy to buy a nonexistent but alleged controlled substance (*U. S. v. Jerome Wayne Paul*), when the intent of the defendants in both cases were ostensibly the same, to-wit: To commit an illegal act?

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Petitioner Jerome Wayne Paul prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, and shows as follows:

OPINION BELOW

The published opinion of the United States Court of Appeals for the Eleventh Circuit is appended to this Petition as Appendix A and is cited as *U. S. v. Jerome Wayne Paul, et al.*, No. 81-7781 F.2d (1983) (Eleventh Circuit). The denial of the petition for rehearing is appended to this Petition as Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on April 28, 1983. Petitioner's petition for rehearing, timely filed, was denied on June 15, 1983. Petitioner verily believes that the Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; has further decided an important question of federal law which has not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Whether the Petitioner's rights of due process and equal protection under the Constitution of the United States were denied?

STATEMENT OF THE CASE

This cause was initially tried before a jury in the United States District Court for the Middle District of Georgia, Columbus Division, on one count of conspiracy to possess marijuana with intent to distribute. Jerome Wayne Paul was found guilty by the jury of violating 28 U.S.C. Section 841, 846 (1976) and sentenced by the Court to three years in the penitentiary.

Following said conviction sentence, Petitioner appealed his judgment of conviction and sentence entered thereon to the United States Court of Appeals for the Eleventh Circuit, and that Court, in a sixteen-page opinion, affirmed the lower Court. See Appendix A for that court's opinion.

Petitioner timely filed a motion for rehearing and said motion was denied on June 15, 1983.

Although there were several questions on appeal in the United States Court of Appeals for the Eleventh Circuit, Petitioner asks this Court to review Section IX of this Court's opinion, which deals with the questions presented in this writ of certiorari.

STATEMENT OF FACTS

On or about March 4, 1982, Petitioner was arrested for conspiracy to possess marijuana with intent to distribute. As stated in the first sentence of the Court of Appeals' Statement of Facts, the defendants' conviction stemmed from an *apparent attempt* on their part to purchase marijuana from an undercover agent. On the other hand, defendants contend they created the appearance of desiring to buy the marijuana as a ruse because Paul was threatened with his life if he did not make the purchase.

The fact is that there was never any marijuana to be purchased and that the undercover agents never allowed the Petitioner herein to commit himself either way on whether he would buy any nonexistent marijuana or turn it down, as he testified he intended to do from the beginning.

Notwithstanding the substantial and exaggerated negotiations, Petitioner never agreed to buy any marijuana, and even if he had agreed to buy marijuana, said marijuana was nonexistent. When Petitioner agreed with the undercover agent to go out and "look at" the marijuana supposedly in the agent's automobile trunk, he had still not committed to buy anything and was merely going to inspect the marijuana for quality, etc. Prior to the agent opening the trunk, whereupon it would have been discovered that no marijuana was in existence, Petitioner was arrested for conspiring to buy marijuana.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for Certiorari and reverse the United States Court of Appeals for the Eleventh Circuit because this decision is in conflict with several other decisions of other circuits.

Petitioner further shows that one of the substantial questions presented in this case is, to-wit: Whether there is a difference in a conspiracy to sell an uncontrolled substance (albeit unknown to the seller/defendant - See *United States v. Binetti*, 552 F.2d 1141, 1142 [5th Cir. 1977]), and a conspiracy to buy a nonexistent but alleged controlled substance (*U. S. v. Jerome Wayne Paul*), when the intent of the defendants in both cases were ostensibly the same, to-wit: to commit an illegal act?

The petitioner submits that the question of whether or not a person may be convicted of conspiracy to do an illegal but impossible act has not been directly presented to the Supreme Court on facts similar to the case at bar. The resulting confusion and conflict among the various circuit courts on this issue begs clarity and thus presents a substantial question for the Supreme Court.

Appellant submits that in the instant case, the government did not prove an illegal conspiracy merely by showing that defendants periodically negotiated to buy a substance which the seller never intended to deliver, and never did deliver.

Agent Crane never intended to produce or deliver an illegal substance. It is an objective fact that no illegal substance was involved in this case. *The reality is that no illegal substance was about to change hands.*

Appellant questions then whether this conspiracy charge should be upheld—when the prosecution knew that

these negotiations in fact could not have led to any illegal transfer. In resolving the issue the Fifth Circuit's approach on a very similar setting is helpful. In *United States v. Binetti*, 552 F.2d 1141, 1142 (5th Cir. 1977), the defendant was convicted of conspiracy to possess and distribute cocaine, along with other charges. Eventually it was disclosed that the substance involved was lidocaine, a harmless, non-controlled substance. Even though the defendant and his associates represented to undercover agents that the substance they were distributing was cocaine, the Fifth Circuit voided Binetti's conviction because the substance actually involved was not a controlled substance. *The conspiracy was not illegal because the government failed to prove that the substance involved was illegal.* In this case, there was no substance. This Court, in its opinion, stated as follows:

Defendants, on the other hand, were conspiring to buy a controlled substance, so they were conspiring to commit an illegal act.

First, Appellant submits that he was not conspiring to buy a controlled substance because he was going to "turn down" the deal and walk away. It is very important to note that Appellant never had the chance to turn down any substance because he was arrested prior to Agent Crane showing him any substance. Secondly, assuming arguendo that Appellant was, on the other hand, conspiring to buy a controlled substance, Appellant submits that he cannot be convicted for conspiring to commit an illegal act which cannot be committed. In *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976), a conviction for attempted distribution of heroin was overturned because the substance, contrary to the defendant's beliefs, was not heroin. In each instance the court determined that the conviction could not stand based solely upon a criminal

intent which was unsupported by objective facts corroborating such a criminal design.

The instant case is even more compelling because no substance was involved at all, much less a sham or bogus substance. Here the negotiations never developed into transactions, as in *Binetti* and *Oviedo*. No agreement was ever formed or completed.

Appellant acknowledges that the gist of a criminal conspiracy is an agreement to effectuate a criminal design, and that it is not necessary to the crime of conspiracy that its object be accomplished. Nevertheless, not all discussions about the commission of future crimes are criminal conspiracies; and not all negotiation sessions evidence criminal agreements.

The preliminary negotiations between defendants and Agent Crane never rose to the level of a criminal conspiracy. While various prices and quantities had been discussed, none of the defendants had entered into an agreement for a specific price; no one had agreed to purchase any given quantity; no one had approved the quality of the substance offered by Crane; and the whole subject of whether anyone would agree to buy from Crane was dependent upon Crane's production of a substance which would satisfy requirements as to its condition and quality. In short, the government interrupted the negotiation process before an agreement had been reached. The parties never crossed the line that separates contemplation of an illegal agreement and the illegal agreement itself.

Of course a mere discussion between parties about entering into a conspiracy, or as the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy, unless the scheme or

some proposed scheme is in fact assented to—concurred in by the parties in some manner, so that their minds meet for the accomplishment of the proposed unlawful act.

United States v. Goldberg, 25 F.Cas. 1342, 1344 (E.D. Wis. 1876).

A mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy, when as yet no conspiracy has been formed, does not meet the requirements of the law.

Id. at 1346. The taxpayers could never fund a prison system if all who sat around and talked about a proposed illegal scheme were guilty of conspiracy. These meetings were never more than talk, desire and anticipation.

A comparable situation is discussed in *United States v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980), where the Court determined the evidence was insufficient to establish a conspiracy for the importation and possession of heroin and cocaine. The Court paid particular attention to the absence of any payment between the alleged supplier and alleged purchaser and any testing or sampling of the controlled substance, where the evidence showed that advance payment and testing were pre-conditions for the transfer. The Court emphasized that there was no agreement as to a fixed price for the substances; the purchaser refused to commit himself until he had conducted tests for the quality of the substances in question; and no advance payment had been made.

The government offered no direct evidence of an actual agreement between co-conspirators to work together to effectuate either the importation or sale of a specific quantity of controlled substances at a fixed price. On the contrary, the evidence disclosed only

general statements of a willingness to enter into such transactions upon the satisfaction of certain conditions—specifically, payment in advance to Melchor-Lopez and testing of the substances by Kommatas—neither of which were satisfied.

* * *

[The evidence] failed to establish the "meeting of the minds" to consummate an illegal transaction which is essential to conspiracy. . . . The discussion . . . was exploratory in nature and largely inconclusive because of Kommatas' refusal to commit himself until he had conducted certain tests for quality of the substances in question. Kommatas displayed a knowledge of the narcotics business and an apparent willingness to engage in it, but although he approached the line of conspiracy, he did not cross it. He produced no money and [no one] complied with his firm request for a preliminary narcotic sample.

Id. at 891-92.

Further, Appellant submits that a conspiracy conviction in this case violates the due process clause of the Constitution.

It offends due process to convict a defendant of conspiracy when the charged conspiracy consists of agreement, and nothing more; when government agents have solicited and held the agreement together, in spite of disagreement among the defendants; and when the government agents have no intention of allowing the conspiracy to succeed and, in fact, arrest the "conspirators" before they can implement their plan. This argument assumes for the purpose of discussion that the defendants formed a conspiracy as charged. It is submitted, however, that this court should not allow a conviction to stand when a gov-

ernment agent is the prime mover behind a conspiracy which he intends to foil before it can be implemented. Affirmance in this case would approve a criminal sanction not for the defendants' bad acts, but their bad thoughts.

Moreover, such a conviction would rest upon the sort of police-state tactics practiced in totalitarian societies. The tactics employed in this case can be employed in any context and against any citizen. The basic strategy is simple and awesome: sit two or more people in a room, manipulate them into agreeing that they want to violate a criminal law, and then arrest them for conspiracy. Even with total electronic surveillance of the conversation, so that there would be no doubt about who said what, this tactic is offensive to long-held views as to the proper role of government.

Anglo-American law has a long tradition that only criminal acts are to be punished. The law does not punish mere intention, thought, or desire, regardless of how vicious these mental states might be.

For the imagination of the mind to do wrong, without an act done, is not punishable in our law, neither is the resolution to do that wrong, which he does not, punishable, but the doing of the act is the only point which the law regards; for until the act is done it cannot be an offence to the world, and when the act is done it is punishable.

Hales v. Petit, 1 Plowden 253, 259, 75 Eng. Rep. 387, 397 (C.B. 1562); *R. v. Scofield*, Cald. Rep. 402 (1784) (Lord Mansfield) ("so long as an act rests in bare intention, it is not punishable by our laws"); 4 Blackstone's Commentaries 21 ("Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act").

. . . the criminal law must, from the nature of the case, be far narrower than morality. . . . No temper of mind, no habit of life, however pernicious, has ever been treated as a crime, unless it displayed itself in some definite overt act. . . . Even for purposes of ecclesiastical censure some definite act of immorality was required. Sinful thoughts and dispositions of the mind might be the subject of confession and penance, but they were not punished by ecclesiastical criminal proceedings. . . . If [the sphere of criminal law] were not so restricted, it would be utterly intolerable; all mankind would be criminals, and most of their lives would be spent in trying and punishing one another for offenses which could never be proved.

Stephen, *History of the Criminal Law of England*, 78 (1883).

Petitioner further points out another case which, notwithstanding the fact it was an "attempt" case and not necessarily a conspiracy case, that further underscores the conflict in the circuits on how to deal with impossibility as a defense in cases where defendants are charged with an "attempt" or a "substantive offense" or "conspiracy." Petitioner finds it very difficult to understand the conflict in the circuit courts which limits an impossibility defense to a case involving a substantive offense versus a charge of conspiracy, when on the other hand they allow an impossibility defense in some attempt cases, but not in conspiracy cases. To really confuse matters, some of the circuits allow the impossibility defense in "conspiracy" cases because the substance was a "sham" substance. However, the confusion is compounded when one realizes that the sellers of the "sham" substances *thought* they were real substances and therefore had the intent required under the decision in the case at bar. Compare *United States v. Joyce*, 693 F.2d 838 (1982) (Eighth Circuit).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SWEARINGEN, CHILDS & PHILIPS, P.C.

By: BEN B. PHILIPS

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(404) 323-6461

CERTIFICATE OF SERVICE

I, Ben B. Philips, attorney of record for the Petitioner, hereby certify that in accordance with the rules of the Supreme Court, I have this date served true and correct copies of this petition upon the Honorable Samuel Wilson, Assistant United States Attorney, by depositing a copy of the same in the United States Mail, with proper address and adequate postage to Post Office Drawer U, Macon, Georgia 31202, and Honorable Rex E. Lee, Solicitor General, United States Department of Justice, Washington, D. C. 20530.

This the 13th day of September, 1983.

BEN B. PHILIPS

Of Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7781

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

JEROME WAYNE PAUL, ALLAN DOUGLAS ELIAS,
TIMOTHY LEE SATTERFIELD,
Defendants-Appellants.

Appeals from the United States District Court
the Middle District of Georgia

(April 28, 1983)

Before RONEY and CLARK, Circuit Judges, and GIBSON,*
Senior Circuit Judge.

GIBSON, Senior Circuit Judge:

Defendants Jerome Paul, Timothy Satterfield, and Allan Elias appeal their convictions under 28 U.S.C. §§ 841, 846 (1976) for one count of conspiracy to possess marijuana with intent to distribute. Paul was sentenced to the custody of the attorney general for three years and Satterfield

*Honorable Floyd R. Gibson, U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

and Elias received two-year sentences. After full consideration of the record, the briefs of the parties, including the objections and contentions of the defendants, we affirm the judgment of the district court.

I.

Defendants' convictions stem from an apparent attempt on their part to purchase marijuana from an undercover agent. Defendants contend they created the appearance of desiring to buy marijuana as a ruse because Paul was threatened with his life if he did not make the purchase.

Law enforcement officials were assisted in the investigation of defendants by Michael Davis, who was facing a charge of attempted arson and who eventually pled guilty to the charge. After Davis was arrested by state law enforcement officials in Muscogee County, Georgia on the arson charge, he offered the officials assistance in developing drug cases, hoping to avoid a prison sentence. Davis and Paul had a mutual acquaintance in the person of Sam Young. Young told Paul that Paul could make some quick money in a marijuana deal. Paul was initially receptive to the idea. Young instructed Paul to travel from his home in Tulsa, Oklahoma to Atlanta, Georgia to meet Davis. Paul contacted Satterfield and the two drove to Atlanta to meet Davis. Apparently Paul had been mistakenly told that Davis was in Atlanta; actually he was in Columbus, Georgia. On February 19, 1981, Paul telephoned Davis from Atlanta. Paul and Satterfield met Davis that evening at a Columbus restaurant. At the restaurant the three men discussed a purchase of 2,000 pounds of marijuana by Paul from a third party. The next day the three men met at a tavern along with Chuck Crane, a drug enforcement administration agent, who was posing

as the marijuana seller. Paul agreed to go back to Tulsa and return to make a deal with Crane for an unspecified amount of marijuana.

On March 4 Paul and Satterfield drove back to Columbus, this time accompanied by Elias. The three met Davis at a motel. They showed Davis \$45,000 in cash. The four went to the tavern to meet Agent Crane. They discussed the delivery of the marijuana, and then went outside to Crane's vehicle, with defendants believing it contained the marijuana. The defendants were arrested on the parking lot.

At the jury trial on the conspiracy charge Paul was the only defense witness. He testified as follows: He created the appearance of desiring to buy marijuana because he feared for his life if he refused to go through with the deal. He originally planned to make the deal with Sam Young, but was unable to raise the \$30,000 Young wanted as a fee. Young told him that if the marijuana showed up in Tulsa and Paul did not have the money, Paul would be killed. He decided to go to Georgia to try to head off the deal, believing that if the deal were called off before the marijuana came to Tulsa there would be no hard feelings. He asked Satterfield for help in trying to head off the deal. He contacted Elias because Elias could acquire a large amount of cash which Paul could show to demonstrate to Davis and Crane that he was serious about making the purchase. Paul's plan was to head off the deal by saying the marijuana was of an inferior quality. Davis told Paul that both Davis and Paul would be killed if Paul did not show some good faith on the deal.

The jury found all three defendants guilty.

II.

Of the many issues raised by defendants, the only one which presents an arguable issue in the factual context of this case is whether the government violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by withholding until trial information concerning the informant Davis, which could be exculpatory to defendants' guilt by bearing on Davis' credibility, and whether the alleged violation requires reversal.

The government brought out on Davis' direct examination that Davis had received \$2,000 from law enforcement officials. Davis testified that the payments were reimbursements, rather than a reward. Defendants argue the government should have told them of these payments before trial, when exculpatory information was requested. Defendants also argue that the government had the duty to find out whether the fact that Davis received five years' probation on the arson charge was a reward for his acting as an informant for the government and the government should have disclosed the results of that investigation to defendants.

As to the payments to Davis, the government did not offer in its brief an explanation for its failure to disclose that information. At oral argument it said the payments were merely reimbursements. However, evidence on whether the payments were a reward is inconclusive; Davis admitted he signed a document saying a \$1,500 payment was a reward. Payments of \$2,000 to a government informant must reasonably be considered material to the defense, even though the government has an innocent explanation for the payments. Therefore, there appears to be a violation of *Brady* in this case.

Nevertheless, reversal is inappropriate because there is no indication the late disclosure prejudiced full im-

peachment of Davis. Reversal for a *Brady* violation is appropriate only when there is such prejudice. *United States v. Nixon*, 634 F.2d 306, 313 (5th Cir.), cert. denied, 454 U.S. 828 (1981). Defense counsel had the opportunity to cross-examine Davis and discuss the payments in closing argument, and the latter option was exercised. The defense had an opportunity to prepare for cross-examination overnight because the examination and cross-examination of Davis were on different days. Defendants have not pointed to any specific way the defense would have differed had information on the payments been disclosed earlier. The *Nixon* court required a showing that an earlier disclosure would have changed the impeachment of the witness even though the disclosure in that case did not occur until cross-examination. *Id.* at 312. At least in this case the government voluntarily revealed the information on direct examination.

As to the probationary sentence being a reward, we do not find an impropriety on the part of the government. The government told defendants of the sentence before the trial. There is no evidence that the government withheld any information suggesting that the sentence was a reward. The suggestion that the government had a duty to investigate whether the sentence was a reward is frivolous; *Brady* does not require the government to acquire evidence not in its possession. *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 1975), cert. denied, 425 U.S. 905 (1976). However, the inference that the sentence was a reward is not unreasonable; Davis was sentenced just a few days after defendants were indicted. On the other hand, there was some evidence Davis was simply fortunate that the jails were overcrowded. The inferences were before the jury. Defense counsel could have questioned Davis' law enforcement contacts or other sources to determine

whether the sentence was a reward. The government's failure to seek out exculpatory information is not a violation of *Brady*.

Defense counsel argued the sentence must have been a reward. It was for the jury to decide the credibility of Davis' explanation for his sentence. Furthermore, even if the jury disbelieved the explanation it could have properly returned guilty verdicts.

III.

Defendants argue that the district court erred in restricting the cross-examination of Davis. We find no merit in this argument.

First we note that Davis' credibility was not the key issue in the case. The testimony of Davis was consistent with Paul's testimony except in one respect: Paul said Davis told him their lives would be in danger if Paul backed out of the deal; Davis denied making such a statement. They agreed that Paul said his life had been threatened by Sam Young.

Second, the district court did permit a wide range of questions designed to attack Davis' credibility, including questions relating to Davis' guilty plea for arson, his prior involvement with drug dealing, his having been fired from a prior job, and whether his probationary sentence was a reward. The district court only restricted questioning on these areas when it was repetitious or when it related to specific details of Davis' arson plan. The district court also refused to permit a witness to testify that Davis planned to burn his house with his children inside as part of his arson scheme.

The district court has broad discretion in determining the extent of cross-examination. *United States v. Diaz*,

662 F.2d 713, 718 (11th Cir. 1981). The district court did not have to permit questions on the details of Davis' crime; questions on the fact of Davis' conviction were adequate. *United States v. Knight*, 607 F.2d 1172, 1176-77 (5th Cir. 1979). The district court permitted extensive questioning attacking Davis' credibility and stopped defense counsel only on extraneous matters. We find no abuse of discretion.

Defendants also argue the district court showed bias by its repeated admonitions to defense counsel not to "try Davis." We find no error here. The court's rulings were proper. The admonitions were repeated only because defense counsel repeatedly failed to follow the court's ruling. Furthermore, the court was deferential to defense counsel in certain respects. It allowed defense counsel to approach the government witness unnecessarily until an objection was made, it allowed questioning on Davis' being fired from a prior job and his work history, and Davis' opinion as to a pecking order in the drug world, and the district court did not reprimand defense counsel for discussing in front of the jury and over objection an accusation that Davis intended to let his children be burned as part of the arson scheme. The district court's treatment of the cross-examination of Davis was entirely fair to defendants.

IV.

Defendants argue they were prejudiced by the trial court's failure to rule on pretrial motions before the start of the trial. They point to Fed. R. Crim. P. 12(e) which requires the district court to rule on pretrial motions before trial, "unless the court, for good cause, orders that [the motions] be deferred for determination at the trial of the general issue or until after verdict." Defendants also argue they did not get a fair hearing on the motions be-

cause they were given a day's notice of a hearing on the motions.

Rule 12(e) is not absolute. It allows the district court to defer ruling for good cause. Paul's counsel, who filed the motions, stated on the record, that he, the prosecutor, and the court had an understanding the court would defer ruling on the motions. The purpose was to save time because the motions were related to the suppression of evidence and it was not clear whether the government would introduce the evidence. As to the short notice for the hearing, the prosecutor told defense counsel by letter almost two weeks before trial to notify him if counsel desired a hearing on the motions. This letter came almost one month after the motions were filed. The federal rules were not violated and the district court's procedure was fair.

V.

Defendants also complain of various aspects of the district court's charge to the jury. Paul argues that the court effectively bolstered the credibility of Davis by charging the jury that it was trying the three defendants and not anyone else. However, when defense counsel objected, the court stated that the jury could consider a criminal record or anything else in assessing a witness' credibility. The court's charge was clear and a correct statement of the law and cannot reasonably be construed as bolstering Davis' credibility.

Paul also argues the court erred in not telling the jury that the government had to prove beyond a reasonable doubt that Paul was not coerced to commit the crime. However, the court gave the precise instruction Paul requested—the Devitt and Blackmar instruction on coercion—even though defense counsel was late in requesting the

instruction. That instruction puts the burden on the government to show lack of coercion beyond a reasonable doubt: "If the evidence in this case leaves you with a reasonable doubt that the defendant . . . acted . . . willfully and voluntarily, and not as a result of coercion, compulsion or duress . . . , then it is your duty to find the defendant not guilty." Devitt and Blackmar, Federal Jury Practice and Instructions, § 14.16 (3rd ed. 1977). The district court gave Paul exactly what he requested of the district court and what he asks of this court.¹

Paul also argues that the district court improperly commented on the evidence when it said it did not remember whether there was any evidence on withdrawal. We find no error here. First, when the court made the comment it emphasized to the jury that the jury would remember the evidence. Second, the court did not remember evidence of withdrawal because there was no evidence of withdrawal from the conspiracy charged in the indictment. The indictment charged the three defendants with a conspiracy among themselves, and Paul testified that from his first contact with Satterfield in connection with the purported drug deal he had no intention of going through with the deal. Any withdrawal involved would have been Paul's withdrawal from his deal with Sam Young, but Paul was not charged with a conspiracy with Sam Young. Therefore, there cannot be any prejudice from the court's remarks. The court has the right to make fair comments on the evidence. *United States v. Blevins*, 555

1. We do not decide whether a defendant is necessarily entitled to the instruction the district court gave in this case. It is possible that if a person is coerced only after he voluntarily involves himself in illegal activities, as Paul did with Sam Young, he would not be entitled to the coercion instruction. When a person enters into an agreement to break the law, there is ordinarily an implied or expressed threat to carry out the deal, and a coercion instruction may be inappropriate in such a circumstance.

F.2d 1236, 1240 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978).

Satterfield and Elias argue that the court erred in telling the jury that they did not have to testify because that instruction only drew attention to their failure to testify. However, the Supreme Court has expressly held that an instruction on the right not to testify over a defendant's objection does not violate that right. *Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978).

Satterfield and Elias also argue they were prejudiced because the instructions were too long and repetitious. Our reading of the charge convinces us that not only was the charge not prejudicial, it was very clear and the court is to be commended for the charge.

VI.

Defendants Satterfield and Elias argue that two tapes of conversations between Paul and Davis should not have been admitted into evidence because they were hearsay as to Satterfield and Elias.

The first tape was not admitted against either Satterfield or Elias and the second was not admitted against Elias. In a multi-defendant trial, particular items of evidence may be admissible as to less than all the defendants. Fed. R. Evid. 105. Although there was not a limiting instruction, Rule 105 requires such an instruction only upon request. Furthermore, the discussion among the attorneys and the court on the limited purpose of the evidence took place in front of the jury. We do not view the lack of a limiting instruction plain error under Fed. R. Crim. P. 52(b). Therefore, the only question is whether the district court erred in admitting the second conversation against Satterfield.

The second conversation was a telephone conversation on February 23, 1981, between Paul and Davis. The conversation took place after Paul and Satterfield had returned to Tulsa after their first meeting with Davis and Crane. During the conversation Paul referred to the possibility of having Satterfield fly to Georgia to pick up the marijuana and made a few other references to Satterfield.

A statement made by a co-conspirator of a party during the course and in furtherance of a conspiracy is not hearsay. Fed. R. Evid. 801(d)(2)(E); *United States v. James*, 590 F.2d 575, 578 (5th Cir. en banc), cert. denied, 442 U.S. 917 (1979). The district court ruled that the conversation was admissible against Satterfield under *James*, which interprets Rule 801(d)(2)(E) to mean that the district court must determine the existence of a conspiracy by substantial, independent evidence. 590 F.2d at 581. The evidence of the existence of the conspiracy was very substantial and included almost all the evidence adduced at trial. The evidence of Satterfield's participation in the conspiracy was also substantial, and included his accompanying Paul during discussions with Davis about the marijuana deal during the first trip to Atlanta. There was no error in the court's admission of the evidence.

VII.

Defendants argue their convictions should be reversed because there was testimony about an item which they say the government illegally seized. Defendants apparently refer to the testimony of Davis that during the second trip to Atlanta Paul and Elias had a mason jar with marijuana which they said was the quality of marijuana they were used to. The prosecutor also referred to Davis' anticipated testimony on the subject of the mason jar

during his opening statement. After defendants' arrests on the parking lot, law enforcement officers found a jar with marijuana in a suitcase in Paul's car during an inventory search. The marijuana was not introduced into evidence.

Obviously we cannot order the suppression of evidence that was not introduced. Defendants apparently argue that (1) Davis' testimony concerning the marijuana should have been suppressed because the police later found the marijuana by illegal means, and (2) the government misled the defense into believing there would be no testimony about the marijuana by telling defense counsel it did not intend to introduce the marijuana. As to the first proposition, we can find no cases which prevent witnesses from testifying about their observations about relevant incidents simply because the object of their observations was later illegally seized by the police.² As to the second proposition, the prosecutor never said that there would be no discussion of the marijuana; he simply said the marijuana found in the car would not be introduced. It may not have been clear to the prosecutor whether the marijuana Davis testified about was the same marijuana found in the car. Furthermore, the prosecutor stated he made the distinction between Davis' anticipated testimony and the marijuana itself to Elias' counsel. There is no indication that any ambiguity was the result of a deliberate intent to deceive. A defense counsel's apparent misunderstanding of a prosecutor's statements about what he intends to introduce is not grounds for reversal. Also, there would appear to be no prejudice because there would have been no basis for suppressing Davis' testimony.

2. We assume for the sake of argument that the seizure of the marijuana was illegal.

VIII.

Defendants argue the court erred in allowing the admission of guns found during an inventory search of defendants' vehicles. Defendants had arrived in Atlanta in two vehicles, a Lincoln Continental and a van. After defendants' arrests, the police conducted inventory searches of the vehicles and found a shotgun in the Lincoln and a pistol in the glove compartment of the van. Defendants objected to the admission of these items on the basis they were found illegally, were irrelevant, and were prejudicial.

The search of the vehicles was legal. The Supreme Court has expressly upheld warrantless inventory searches. *South Dakota v. Opperman*, 428 U.S. 364 (1976). Although the guns may have been prejudicial, they were relevant to refuting Paul's claims he had come to Georgia for an innocent purpose. The decision as to whether the unfair prejudicial effect of evidence outweighs its probative value under Fed. R. Evid. 403 is within the discretion of the district court. *United States v. Marino*, 617 F.2d 76, 82 (5th Cir.), cert. denied, 449 U.S. 1015 (1980).

IX.

Paul argues that he cannot be convicted because the fact that Crane had no marijuana to sell to defendants made the crime of possession impossible to commit. Paul raised this argument for the first time in the rebuttal portion of his oral argument and therefore we could choose not to consider it here. *United States v. Bowman*, 636 F.2d 1003, 1013 n.3 (5th Cir. 1981). This claim is without merit because the impossibility of committing the substantive offense is not a defense to a charge of conspiracy. *United States v. Booty*, 621 F.2d 1291, 1297 (5th Cir.), modified on another issue, 627 F.2d 762 (1980); *United States v. Albert*, 675 F.2d 712, 715-16 (5th Cir. 1982), citing

United States v. Rabinowich, 238 U.S. 78, 86 (1915); W. LaFave and A. Scott, Criminal Law, § 62, at 475-76 (1972).

Paul argues that two Fifth Circuit cases not cited in the briefs support an impossibility defense. *United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976); *United States v. Binetti*, 552 F.2d 1141 (5th Cir.), *granting petition for rehearing on* 547 F.2d 265 (1977). In these cases convictions were reversed because the defendants were attempting to sell a sham substance, rather than a controlled substance. *Oviedo* is not on point because it dealt with a charge of attempt to distribute rather than a conspiracy charge. 525 F.2d at 882. Impossibility is a defense in some attempt cases, but not in conspiracy cases. W. LaFave and A. Scott, Criminal Law, § 62, at 474-75 (1972). In *Binetti* the court reversed the conspiracy conviction of a defendant who purported to be selling cocaine, but in fact the defendant and his co-conspirator sold a sham substance to an undercover agent. The rationale of the *Binetti* decision is that since there is not a crime of selling an uncontrolled substance, there cannot be a crime of conspiring to commit that act. *United States v. Rey*, 641 F.2d 222, 223 n.2 (5th Cir.), cert. denied, 454 U.S. 861 (1981). Defendants, on the other hand, were conspiring to buy a controlled substance, so they were conspiring to commit an illegal act.

X.

Paul's last argument is that the evidence was insufficient to support the verdict. The evidence included testimony of Davis, the tapes of conversations with Paul, and Paul's own testimony.

Defendants undeniably created the impression they wanted to buy marijuana. The jury was free to believe or not to believe Paul's exculpatory explanation for the

creation of that impression. Credibility choices are to be made by the jury. We must view the evidence in the light most favorable to the verdict and accept those credibility choices that tend to support the verdict. *United States v. Hewitt*, 663 F.2d 1381, 1384 (11th Cir. 1981). The evidence is clearly sufficient to support the verdict.

Having considered the many issues raised by appellants, we AFFIRM the judgment of the district court.

APPENDIX B

(Filed June 15, 1983)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7781

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
JEROME WAYNE PAUL,
Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Georgia

ON PETITION FOR REHEARING

(June 15, 1983)

Before RONEY, CLARK, and GIBSON,* Senior Circuit
Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed
in the above entitled and numbered cause be and the same
is hereby denied.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

*Honorable Floyd R. Gibson, U. S. Circuit Judge for the
Eighth Circuit, sitting by designation.